United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2297

ORIGINAL

To be argued by
JOSEPH D. AHEARN

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

TOYOMENKA, INC.,

Plaintiff-Appellant,

—against—

S. S. "TOSAHARU MARU", her engines, boilers, etc.,

—and against—

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,
d/b/a Y. S. LINE,

Defendant and Third Party Plaintiff-Cross-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC., and McROBERTS PROTECTIVE AGENCY, INC.,

Third-Pary Defendant and Cross-Appellant.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

(Additional title appears on reverse side of this cover)

BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE McROBERTS PROTECTIVE AGENCY, INC.

J. ROBERT MORRIS,
Attorney for Third-Party Defendant-Appellee McRoberts Protective Agency, Inc.
111 Fulton Street
New York, N. Y. 10038
766-2528

JOSEPH D. AHEARN,
Of Counsel.

MARUBENI-IIDA (AMERICA), INC. and MURILSPUN, LTD.,

Plaintiffs-Appellants,

—against—

S. S. "TOSAHARU MARU", her engines, boilers, etc.,

—and against—

YAMASHITA-SHINNIHON KISEN K.K., YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. and TEXAS TRANSPORT & TERMINAL CO., INC.,

Defendant and Third Party Plaintiff-Cross-Appellants.

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC., and McROBERTS PROTECTIVE AGENCY, INC.,

Third-Party Defendant-Appellee.

TABLE OF CONTENTS

Cases Cited

PAGE

Statute Cited

United States Court of Appeals

FOR THE SECOND CIRCUIT

TOYOMENKA, INC.,

Plaintiff-Appellant,

—against—

S. S. "TOSAHARU MARU", her engines, boilers, etc.

—and against—

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., d/b/a Y. S. LINE,

Defendant and Third Party Plaintiff-Cross Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC., and McROBERTS PROTECTIVE AGENCY, INC.,

Third-Party Defendant and Cross Appellant.

MARUBENI-IIDA (America), INC. and MURILSPUN, LTD.,

Plaintiffs-Appellants,

—against—

S. S. "TOSAHARU MARU", her engines, boilers, etc.,

—and against—

YAMASHITA-SHINNIHON KISEN K.K., YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. and TEXAS TRANSPORT & TERMINAL CO., INC.,

Defendant and Third Party Plaintiff-Cross Appellants,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC., and McROBERTS PROTECTIVE AGENCY, INC.,

Third-Party Defendant-Appellee.

On Appeal from Judgment of the United States District Court for the Southern District of New York

BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE McROBERTS PROTECTIVE AGENCY, INC.

Introductory Statement

Plaintiffs Toyomenka, Inc., Marubeni-Iida (America), Inc. and Muriispun, Ltd. ("plaintiffs") appeal from the judgment (Judge Duffy) entered on September 3, 1974.

Cross-appeals had been taken by defendant and third-party plaintiff Yamashita-Shinnihon Steamship Co. (the carrier) and by third-party defendant International Terminal Operating Co., Inc. (the stevedore) with respect to Judge Duffy's denial of their claim for attorneys' fees

against third-party defendant McRoberts Protective Agency, Inc. ("McRoberts"). A cross-appeal, addressed to Judge Duffy's finding that McRoberts was negligent, was also taken by McRoberts. By stipulation dated December 19, 1974, these cross-appeals were withdrawn. On this appeal, McRoberts does not challenge Judge Duffy's finding that it was negligent.

The bills of lading under which the goods were shipped are subject to the Carriage of Goods by Sea Act (46 U.S.C., § 1300 et seq.). When the cargo consigned to New York was completely unloaded, the goods were discovered to be missing.

McRoberts, a protective agency, had a contract with the stevedore to guard and protect the cargo.

Judge Duffy held that McRoberts was entitled by the bill of lading to the limitation of liability of $500 per package as contained in the Carriage of Goods by Sea Act. The correctness of his decision is the question presented upon this appeal.

The Pertinent Provision of the Bill of Lading

Paragraph 37 of the bill of lading issued by the carrier to plaintiffs provides:

> "Liability of Stevedores and Others. Without prejudice to any other provision hereof it is hereby expressly agreed that all servants, agents *and independent contractors* (including in particular, but not by way of limitation any stevedores) *used or employed by the Carrier for the purpose of or in connection with the performance of any of the Carrier's obligations under this Bill of Lading* shall in consideration of their agreement to be so used or employed have the benefit of all rights defences, excep-

tions from or limitations of liability or immunities of whatsoever nature referred to or incorporated herein applicable to the carrier or to which the Carrier is entitled hereunder so that in no circumstances shall any such servants, agent or independent contractor be under any liability greater than that of the carrier hereunder. It is hereby further expressly agreed that for the purpose of the foregoing provision the Carrier is or shall be deemed to be acting as agent or trustee on behalf and for the benefit of all persons who are or may be its servants, agents or independent contractors from time to time for the purpose of or in connection with the performance of any of Carrier's obligations under this Bill of Lading and that all such persons shall to this extent be or be deemed to be parties to the contract contained in or evidenced by this Bill of Lading" (emphasis added).

POINT I

McRoberts, an "independent contractor," was, under well-settled authorities, entitled to the benefit of the limitation.

We respectfully submit that Judge Duffy was eminently correct in his holding that McRoberts was a beneficiary of the limitation of $500 per package. His decision is in absolute accord with recent decisions of this Court as well as other Circuits.

Completely dispositive is this Court's decision in *Bernard Screen Printing Corp.* v. *Meyer Line*, 464 F2d 934 (1972), cert. denied 410 U.S. 910, 93 S. Ct. 966, 35 L. Ed. 2d 272 (1973). In that case, plaintiff-shipper (represented

by the same attorneys representing plaintiffs on the present appeal) transported machinery aboard a vessel of the Meyer Line. The machinery was negligently dropped by the defendant-stevedore, Universal, upon discharge of the vessel. The issue was whether the bill of lading entitled the stevedore to the $500 limitation. The stevedore had agreed, by separate contract with the carrier, to stevedore the vessel and perform other services. The relevant parts of the bill of lading, as set forth in this Court's opinion, provided:

> "The contract evidenced hereby is between the shipper and the owner or demise charterer of the ship designated to carry the goods. It is understood and agreed that, other than said shipowner or demise charterer, *no person, firm or corporation or other legal entity whatsoever (including the master, officer and crew of the vessel and all agents and independent contractors) is, or shall be deemed to be, liable to the shipper or consignee as carrier, bailee or otherwise howsoever in contract or in tort.* If, however, it shall be adjudged that any other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility to the shipper or consignee, all defences (including all limitations of said exonerations from liability) provided to said shipowner or demise charterer by law or by terms hereof shall be available to such other . . ." (emphasis by this Court).

As in the case at bar, the bill of lading expressly extended the limitation to "independent contractors." The bill of lading in *Bernard Screen* did not expressly include the stevedore. This Court in *Bernard Screen,* referring to the bill of lading, held:

> "This provision gives to all 'legal entities' reasonably comprehended within its language, and, spe-

> cifically to 'independent contractors' such as the stevedore here, the benefit which the carrier and the ship have under COGSA to limit liability to a maximum of $500 per unit 'for any loss or damage to or in connection with the transportation of goods' unless the goods are shipped pursuant to a specific declaration of nature or value, under an adjusted rate. 46 U.S.C. § 1304(5)" (464 F2d at 935-36).

This Court in *Bernard Screen* pointed out (464 F2d at 936, n. 1) that the Supreme Court in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 79, S. Ct. 766, 3 L. Ed.2d 820 (1959), had stated that:

> "Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.' *Boston Metals Co.* v. *The Winding Gulf*, 349 U.S. 122, 123-124, 75 S. Ct. 649, 650, 99 L.Ed. 933 (concurring opinion)."

This quotation from *Herd* is emphasized in the brief of plaintiffs in the instant case (p. 7).

But, rejecting the contention of plaintiff-appellant in *Bernard Screen* that the bill of lading failed to meet the "clarity" test laid down in *Herd*, this Court in *Bernard Screen* then held:

> "Appellant contends that the Meyer Line bill of lading lacks the required 'clarity of the language used.' However, we agree with the court below that Universal, which independently contracted by

separate contract with Meyer Line to discharge cargo from the S.S. Havlom, was indeed an 'independent contractor,' and hence comprehended within the language used in clause 1(J)" (464 F2d at 936, n.1).

Plaintiffs on the instant appeal greatly rely on *Herd* (brief, pp. 6, 7, 10, 11). This Court in *Bernard Screen,* discussing *Herd,* held:

> "However, in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.,* 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959), the Supreme Court, while unanimously denying to a negligent stevedore the classification of a 'carrier' under 46 U.S.C. § 1301(a), unanimously stated:
>
> > 'Looking to the limitation-of-liability provisions of the bill of lading, we see that they, like § 1304 (5) of the Act and its legislative history, do not advert to stevedores or agents. Instead they deal only with the 'Carrier's liability' to the shippers. They say that 'the Carrier's liability, if any, shall be determined on the basis of $500 per package.' There is, thus, nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract. Since they did not do so, it follows that the provisions of the bill of lading did 'not cut off [respondent's] remedy against the agent that did the wrongful act.' *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U.S. 549, 568, 42 S. Ct. 386, 388, 66 L.Ed. 762.

> "We therefore conclude that there is nothing in the provisions, legislative history and environment of the Act, or in the limitation-of-liability provisions of the bill of lading, to indicate any intention, of Congress by the Act, *or of the contracting parties by the bill of lading, to limit the liability of negligent agents of the carrier*" (464 F.2d at 936) (emphasis by this Court).

Referring to the explicit warrant in *Herd* which permits the parties to contractually extend the limitation, this Court held that the limitation was applicable:

> "This language has prompted a belief that a cargo-carrier and a cargo-owner may contractually extend to a stevedore the benefit enjoyed by carriers under COGSA's $500 limitation on damages, and we consider ourselves bound by a previous decision of this court permitting parties to do precisely that. In language unmistakably clear, Judge Bonsal, relying upon *Herd*, held in *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines, Inc.*, 275 F.Supp. 76 (S.D.N.Y. 1967), that a negligent stevedore was entitled to the benefit of the $500 limitation of liability when the applicable bill of lading contained language set forth in the margin. This court affirmed. 386 F.2d 839 (2 Cir. 1967) 'on the opinion of Judge Bonsal' and the Supreme Court denied certiorari, 390 U.S. 1013, 88 S.Ct. 1263, 20 L.Ed. 2d 162 (1968)" (464 F.2d at 935-36).

We respectfully submit that this Court's decision in *Bernard Screen*, which is not mentioned in appellants' brief, is squarely in point with the instant case. It presents conclusive authority to substantiate Judge Duffy's decision below that McRoberts, an independent contractor, is encompassed within the ambit of the limitation.

Plaintiffs-appellants, in their brief (p. 10), stress that portion of the quotation in *Herd* to the effect that if it had been the purpose of the contracting parties to extend the limitation to other parties, it must be presumed that the parties would in some way have expressed such purpose in the bill of lading. However, in *Herd,* as noted in *Bernard Screen,* the Supreme Court specifically stated that the contracting parties in the bill of lading had not purported to extend the limitation to anyone other than the carrier.

Directly in point also is *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines, Inc.,* 275 F.Supp. 76 (S.D.N.Y., 1967), affd. 386 F.2d 839 (1967), cert. denied 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 162 (1968), relied upon by this Court in *Bernard Screen.* In *Carle & Montanari,* the question was whether the stevedore (John W. McGrath Corporation) was entitled to the $500 limitation. It is implied by plaintiffs in the instant case (brief, p. 12) that the bill of lading in *Carle & Montanari* included the language "all agents and all stevedores." The bill of lading in *Carle & Montanari,* as set forth in Judge Bonsal's opinion, provided:

> "1. (a) * * * The Terms of this bill of lading constitute the contract of carriage, which is between the Shipper, Consignee and owner of the goods, and the owner or demise charterer of the vessel designated to carry the goods. It is understood and agreed that, *other than said shipowner or demise charterer,* no person, firm or corporation or other legal entity whatsoever (including the Master, officers and crew of the vessel, *all agents and all stevedores and other independent contractors whatsoever*) is, or shall be deemed to be liable with respect to the goods *as carrier, bailee or otherwise howsoever,* in contract or in tort. If, however, it

> shall be adjudged that any other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility with respect thereto, all limitations of and exoneration from liability provided by law or by the terms hereof shall be available to such other. In contracting for the foregoing exemptions, limitations and exonerations from liability, the Carrier is acting as agent and trustee for the other above mentioned" (275 F. Supp. at 77-78) (emphasis by Judge Bonsal).

Thus, contrary to plaintiffs' implication in the present case that the bill of lading in *Carle & Montanari* applied only to "all agents and stevedores," the bill of lading there applied to "all agents and all stevedores and other independent contractors whatsoever." In concluding that the limitation applied to the stevedore, Judge Bonsal held:

> "The parties to a bill of lading may extend a contractual benefit to a third party by clearly expressing their intent to do so. *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 79 S.Ct. 766, 3 L. Ed.2d 820 (1959); *Cabot Corp.* v. *SS Mormacscan, supra; Virgin Islands Corp.* v. *Merwin Lighterage Co.*, 177 F. Supp. 810 (D.C.V.I. 1959). Therefore, if clause 1(a) of the bill of lading expresses an intent to extend the benefit of the $500 per package limitation of liability to the stevedore, then the stevedore's liability must be so limited.
>
> "In interpreting clause 1(a), the italicized words in the third sentence, 'other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility with respect thereto,' must be read together with the second sentence which, in excluding persons other than the shipowner or demise charterer, specifically mentions

> stevedores in the exclusion. Reading the two sentences together, it is clear that the bill of lading seeks to exclude stevedores from liability, in the second sentence and to provide in the third sentence, that where, as here, the stevedore is liable, its liability is limited to $500 as provided in clause 17 of the bill of lading. The intent of the parties to the bill of lading to extend the limitation of liability to the stevedore is adequately expressed therein. Consequently, the court holds that under the bill of lading the stevedore is entitled to the benefit of the $500 per package limitation of liability" (275 F. Supp. at 78).

In rejecting reliance by the plaintiff on *Herd,* Judge Bonsal held, as did this Court in *Bernard Screen* (464 F. 2d at 936), that in *Herd,* there had been no contractual provision whereby the limitation was extended to other parties (275 F. Supp. at 78). This Court in *Carle & Montanari* affirmed on Judge Bonsal's opinion, 386 F.2d 839 (1967), and the Supreme Court denied certiorari, 390 U.S. 1013, 88 S. Ct. 1263, 20 L.Ed.2d 162 (1968).

Secrest Machine Corp. v. *S.S. Tiber,* 450 F.2d 285 (5th Cir. 1971), is also controlling. On that appeal, plaintiff-consignee (represented by the same attorneys representing plaintiffs on the instant appeal) claimed that the stevedore was not entitled to the limitation. There was no specific reference to the stevedore in the bill of lading which provided:

> "All defenses as aforesaid shall inure also to the benefit of the Carrier's agents, servants and employees and of any independent contractor performing any of the Carrier's obligations under the contract of carriage or acting as bailee of the goods, whether sued in contract or in tort.

> "For the purpose of this clause all such persons, firms or legal entites as alluded to above shall be deemed to be parties to the contract evidenced by this B/L" (450 F.2d at 286).

In affirming the District Court (324 F. Supp. 671) which had determined that the stevedore was entitled to the limitation, the Court of Appeals held:

> "While it is true that the $500-per-package limitation of the Act does not advert to stevedores, *Robert C. Herd & Co., Inc.* v. *Krawill Machinery Corp.*, 1959, 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed.2d 820, a carrier is free to contract with the owner or consignee of cargo to limit the liability of the carrier's agents, such as stevedores. *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines, Inc.*, S.D.N.Y. 1967, 275 F.Supp. 76, aff'd 2 Cir. 1967, 386 F.2d 839, cert. denied, 1968, 390 U.S. 1013, 88 S.Ct. 1263, 20 L.Ed.2d 162. The bill of lading executed between appellant and carrier here expressly provided that all defenses available to carrier 'shall inure also to the benefit of the Carrier's agents, servants and employees and of any independent contractor performing any of the Carrier's obligations under the contract of carriage or acting as bailee of the goods, whether sued in contract or in tort.' It is clear that the term 'independent contractor' includes stevedores, and therefore the limitation defense is available to Strachan. *Bernard Screen Printing Corp.* v. *Meyer Line*, S.D.N.Y. 1971, 328 F.Supp. 288; see *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines, Inc., supra.*" (450 F.2d at 286-87).

The Secrest decision (not mentioned in appellants' brief) presents compelling authority for McRoberts on the present appeal.

In *Tessler Brothers (B.C.) Ltd.* v. *Italpacific Line,* 494 F.2d 438 (9th Cir. 1974), the question was whether the stevedore (Matson Terminals) was entitled to the limitation. There was no specific mention of the stevedore in the bill of lading which provided:

> "It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee, or Owner of the goods or to any of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and *every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier* acting as aforesaid and for the purpose of all the foregoing provisions of the Clause the Carrier is or shall be deemed to be acting as agent or trustees on behalf and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidence by this Bill of Lading" (494 F.2d at 441, n.1) (emphasis by court).

Disposing of the initial claim of plaintiff-Tessler (the holder in due course of the bill of lading) that the Su-

preme Court's decision in *Herd, supra,* 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed.2d 820, should not be interpreted as holding that the parties may properly extend the limitation to the stevedore by clearly expressing their intent to do so in the bill of lading, the court said:

> "The *Herd* court concluded that the stevedore's liability was not limited because no statute limited it and because the stevedore 'was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract.' 359 U.S. at 308, 79 S. Ct. at 773. We and other courts interpret this to mean that under certain circumstances parties to a contract of carriage may limit a stevedore's liability, but only if the intent to do so is clearly expressed. *Bernard Screen Printing Corp.* v. *Meyer Line,* 464 F.2d 934, 936 (2d Dir. 1972), cert. denied, 410 U.S. 910, 93 S. Ct. 966, 35 L.Ed.2d 272 (1973); *Secrest Machine Corp.* v. *S.S. Tiber,* 450 F.2d 285, 286 (5th Cir. 1971); *Cabot Corp.* v. *S.S. Mormacscan,* 441 F.2d 476, 478 (2d Cir. 1971), cert. denied, 404 U.S. 855, 92 S.Ct. 104, 30 L.Ed.2d 96 (1971); *Dorsid Trading Co.* v. *S/S Fletero,* 342 F. Supp. 1, 6 (S.D.Tex. 1972); *Carle & Montanari, Inc.* v. *American Export Isbrandtesen Lines, Inc.,* 275 F.Supp. 76, 78 (S.D.N.Y.), aff'd mem., 386 F. 2d 839 (2d Cir. 1967), cert. denied, 390 U.S. 1013, 88 S.Ct. 1263, 201 L.Ed.2d 162 (1968)" (494 F.2d at 442).

The court then held that the bill of lading did extend to independent contractors:

> "Clause 21 of the bill of lading has three distinct limbs; first, it exonerates from liability to the shipper any 'servant or agent of the Carrier (including

every independent contractor . . .)'; second, it extends the carrier's rights and limitations of liability to 'every such servant or agent of the Carrier . . .'; and, third, it provides that the carrier is deemed to be acting on behalf of 'his servants or agents . . . (including independent contractors as aforesaid) . . .' Because of the term 'independent contractors' is not used in the second of these three provisions, Tessler contends that this provision is inapplicable to independent contractors and, thus, to Matson.

"Although we strictly construe Clause 21, we do not read it as narrowly as Tessler would have us. Reading the clause as a whole, it is apparent that 'such servant or agent' in the second provision refers to the phrase in the first provision 'servant or agent of the Carrier (including every independent contractor . . .)' The word 'such' in the second provision emphasizes that a modification of 'servant or agent'—that is, 'including every independent contractor'—was intended to apply in the second provision" (494 F.2d at 455-46).

Reliance was had upon this Court's decisions in *Bernard Screen* and *Carle & Montanari*:

"The format of Clause 21 is very similar to the bill of lading clauses considered in *Bernard Screen Printing Co.* v. *Meyer Line,* 328 F.Supp. 288 (S.D. N.Y. 1971), aff'd, 464 F. 2d 934 (2d Cir. 1972), cert. denied, 410 U.S. 910, 93 S. Ct. 966, 35 L.Ed.2d 272 (1973), and *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines, Inc.,* 275 F.Supp. 76 (S.D.N.Y. 1967), aff'd mem., 386 F.2d 839 (2d Cir. 1967), cert. denied, 390 U.S. 1013, 88 S.Ct. 1263, 20 L.Ed.2d 162 (1968). In both cases, the relevant

> clause first purported to exonerate completely from liability specifically named legal entities. The second provision stated the limitation of liability; however, in listing those to whom it extended, the provision did not repeat the parties set forth in the first provision, but merely used a phrase that referred to those parties. The courts in *Bernard Screen* and *Carle & Montanari* held, as we do now, that this format is sufficient to extend the limitation of liability in the second provision to the specific parties listed in the first provision" (494 F.2d at 446).

Judge Tyler in *Royal Typewriter Co., Div. of Litton B.S.* v. *M/V Kulmerland,* 346 F.Supp. 1019 (1972), affd. 483 F.2d 645 (1973), stated:

> "Here it is interesting to note that ITO, Pioneer and Sullivan [the protective agency] likely are covered by and thus entitled to invoke the $500 limitation under the terms of paragraph 24 of the ocean bill. See *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines,* 275 F.Supp. 76 (S.D.N.Y.), aff'd 386 F.2d 839 (2d Cir., 1967), cert. den. 390 U.S. 1013, 88 S.Ct. 1263, 20 L.Ed.2d 162 (1968); *Bernard Screen Printing Corp.* v. *Meyer Line, etc.,* 328 F. Supp. 288 (S.D.N.Y., 1971), aff'd 464 F.2d 934 (2d Cir., 1972)' (346 F. Supp. at 1025, n.6).

The identical provision passed upon by this Court in *Bernard Screen, supra,* 464 F.2d 934 (1972), cert. denied 410 U.S. 910, 93 S.Ct. 966, 35 L.Ed.2d 272 (1973) had been interpreted previously in *Middle East Export* v. *Concordia Line,* 64 Misc.2d 270, 274-75 (Civil Ct., N.Y. County, 1970), modified with respect to attorneys' fees only 71 Misc. 2d 365 (App. Term, 1st Dept 1972), and there given the same interpretation. In the District Court

in *Bernard Screen,* 328 F.Supp. 288 (S.D.N.Y. 1971), Judge Newman, sitting by designation, whose decision was affirmed by this Court, followed *Middle East Export* in his opinion (328 F.Supp. at 289).

Plaintiffs' reliance (brief, p. 12) upon this Court's decision in *Cabot Corp.* v. *S.S. Mormacscan,* 441 F.2d 476 (1971), cert. denied 404 U.S. 855 (1971), is entirely misplaced. In *Cabot Corp.,* clause 2 of the bill of lading provided:

> "In this bill of lading, the word 'ship' shall include any substituted vessel and any craft, lighter, or other means of conveyance owned, chartered, operated or used by the carrier in performing this contract; *the word 'carrier'* shall include the ship, her owner, operator, demise charterer, time charterer, master and any substituted carrier, whether acting as carrier or bailee, and *all persons rendering services in connection with performance of this contract;* * * *" (441 F.2d at 477-78) (emphasis by this Court).

Clause 13 of the bill of lading provided:

> "In case of any loss or damage to or in connection with goods exceeding in actual value $500, lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the *carrier's* liability in any capacity, if any, shall be determined on a value of $500 per package or per customary freight unit, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra freight paid

> if required; and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed the declared value and the carrier's liability in any capacity, if any, shall not exceed the declared value. Whenever less than $500 per package or other freight unit, the value of the goods in the calculation and adjustments of claims shall, to avoid uncertainties and difficulties in fixing value, be deemed to be the invoice value, plus freight and insurance if paid, whether any other value be higher or lower" (441 F.2d at 478) (emphasis by this Court).

This Court, in concluding that the bill of lading did not possess sufficient clarity to entitle the stevedore to the benefit of the limitation, held:

> "The language in the instant bill of lading does not exhibit the clarity required to extend the limitation of liability to the appellant-stevedore. Even if Cabot had actually received a copy of the bill of lading before delivery of the turbogenerator for shipping, it could not have ascertained from the ambiguous language employed whether the $500.00 limitation applied to the stevedore. One can only guess whether clause 13 which speaks in terms of the 'carrier's liability in any capacity' is intended to incorporate the phrase 'all persons rendering services in connection with performance of this contract' from clause 2, and, indeed, initially, whether 'all persons rendering services' is designed to include stevedores loading the goods of another shipper.
>
> "While there is no doubt that the parties to a bill of lading may extend a contractual benefit to a

> third party by clearly expressing their intent to do so, *Herd & Co.* v. *Krawill Machinery Corp., supra* at 302, 79 S.Ct. 766, an intention to extend benefits of the limitation in the present bill to the stevedore would most naturally have been expressed by the addition of the term 'stevedore' to the long list of various persons included under the definition of 'carrier' in clause 2" (441 F.2d at 478-79).

The same bill of lading as in *Cabot Corp.* was at issue in this Court's decision in *Rupp* v. *International Terminal Operating Co.*, 479 F.2d 674 (1973) and this Court, upon the authority of *Cabot Corp.*, held that the stevedore was not entitled to the limitation.

Cabot Corp. and *Rupp* are not authorities for plaintiffs here. Decisively, the bill of lading in the instant case covers "all servants, agents and independent contractors." This categorical language was not present in *Cabot Corp.* and *Rupp*, and, in *Rupp*, this Court emphasized that *Bernard Screen* and *Carle & Montanari* were still sound law. In *Rupp*, this Court reiterated the viability of *Bernard Screen*:

> "Contrary to the assertion of ITO and the view of the district court below, we hold that our decision in *Bernard Screen Printing Corp.* v. *Meyer Line*, 464 F.2d 934 (2 Cir. 1972), does not require a different result. In *Bernard Screen*, the bill of lading gave to all 'legal entities' reasonably comprehended within its language, and specifically to 'independent contractors', the benefit of a limitation of liability. We held that a negligent stevedore was entitled to the benefit of the $500 limitation of liability since he could be readily characterized as an 'independent contractor' (479 F.2d at 677).

Carle & Montanari was also held in *Rupp* to be sound law:

> "See also *Carle & Montanari, Inc.* v. *American Export Isbrandtsen Lines, Inc.*, 275 F.Supp. 76 (S.D. N.Y. 1967), aff'd. 386 F.2d 839 (2 Cir. 1967), cert. denied, 390 U.S. 1013 (1968) (stevedore entitled to benefit of limitation where clause included 'all agents and all stevedores and other independent contractors whatsoever')" (479 F.2d at 677, n.2).

Furthermore, in *Rupp,* this Court held that the stevedore was not entitled to the limitation under an agency theory (479 F.2d at 677-78). We do not claim the benefit of limitation pursuant to any agency theory. McRoberts was irrefutably an "independent contractor" and it is that status which accords to McRoberts the benefits of the limitation in the bill of lading which, unlike that in *Cabot Corp.* and *Rupp,* provides that an "independent contractor" is entitled to the limitation.

a. McRoberts was an "independent contractor" and was used "by the Carrier for the purpose of or in connection with the performance of any of the Carrier's obligations" under the bill of lading.

There is no dispute that McRoberts was an "independent contractor" (see plaintiffs' brief, p. 10). The bill of lading grants the benefit of the limitation to all independent contractors "used or employed by the Carrier for the purpose of or in connection with the performance of any of the Carrier's obligation under this bill of lading."

The safekeeping of the goods, while they were on the pier, continued to be the responsibility of the carrier. As stated by Judge Duffy in his decision below:

"In any event, the primary responsibility for the loss of the goods at issue lies with the carrier, Y.S. Lines. Its bill of lading provides that the Hague Rules (COGSA) would be in effect:

> 'before the goods are loaded on and after they are discharged from the vessel and throughout the entire time the goods are in the custody of the Carrier.'

"The maritime contract continued even after the goods were unloaded on the pier.

> 'As has been frequently and recently held, the contract continued to govern the relationship between the plaintiff and Lloyd [the shipper] after discharge but before delivery of [the goods] to plaintiff or its agents.' *Royal Typewriter Co.* v. *M.V. Kulmerland*, 346 F. Supp. 1019, 1023 (S.D. N.Y. 1972), *aff'd* 483 F.2d 645 (2d Cir. 1973)."

A carrier's liability continues while the goods are unloaded on the pier. Indeed, in the case at bar, liability has been fastened upon [redacted] the carrier [redacted] by virtue of the disappearance of the goods while they were on the pier.

See also *David Crystal, Inc.* v. *Cunard Steam-Ship Co.*, 339 F.2d 295, 298 (2d Cir. 1964), cert. denied 380 U.S. 976 (1965). To the same effect is the decision of Judge Lumbard, sitting by designation, in *Sperry Rand Corp.* v. *Norddeutscher Lloyd*, 1973 A.M.C. 1392, 1395, 1397 (S.D.N.Y. 1973). Last month, this Court in *Cameco* v. *S.S. American Legion*, —— F.2d —— (Nos. 39, 64-Sept. Term, 1974) affirmed the District Court (Judge Metzner) who had found that both the carrier and stevedore were liable for an apparent theft occurring before delivery at the terminal.

In *Cameco,* the protective agency (Sullivan Security Services, Inc.) was exonerated from liability.

In the instant case, McRoberts' duties were *solely* in relation to the goods. McRoberts' *sole* duties were to protect the goods. This is seen from Judge Duffy's decision:

> "The other 42 cartons and bales were placed by ITO in the bale area of the shed on Pier 6. The bale area was protected by a guard employee of McRoberts whose responsibility included making sure that the packages were taken out of the area only upon presentation of an order. McRoberts also supplied a guard on each of the two loading platforms where the trucks came to pick up merchandise on Pier 6. Two other McRoberts guards were also on the dock during working hours, one patrolling and the other stationed in the crib area. There was also a McRoberts guard at the gate outside the dock.
>
> "During non-working hours there was a McRoberts guard at the gate and another inside the locked pier."

The phrase contained in the bill of lading "in connection with" has been passed upon repeatedly in the interpretation of indemnification contracts and held to be the most inclusive term possible (*Turner Construction Co.* v. *Belmont Iron Works,* 158 F. Supp. 309, 310 (E.D. Penn); *Smoke* v. *Turner Const. Co.,* 54 F. Supp. 369, 371-72 (Dist. Ct., D. Delaware); *Kokusai Kisen Kabushiki Kaisha* v. *Columbia S. Co.,* 23 F. Supp. 403, 405-06 (S.D. N.Y.), affd. 100 F.2d 1016 (2d Cir.); *American Agric. Chem. Co.* v. *Tampa Armature Works,* 315 F.2d 856, 859-60 (5th Cir.); *Aluminum Co. of America* v. *Hully,* 200 F.2d 257, 262-63 (8th Cir.)).

The bill of lading includes within its scope any "independent contractors" who are "used or employed by the Carrier for the purpose of or in connection with the performance of any of the Carrier's obligations under this Bill of Lading." Although no contract existed directly between the carrier and McRoberts, McRoberts was, in the carrying out of its protective work, being used by the carrier, whose obligation for the protection of the goods was coterminous with the protective work being performed by McRoberts.

McRoberts was performing specific duties in a specific area. The work being performed by McRoberts not only was solely in reference to the goods, but most significantly, was the undertaking of an obligation which was fastened upon both the stevedore and, ultimately, the carrier. No one can dispute that protective services were required. The basic obligation was imposed upon the carrier. The duty of performing that obligation of the carrier had been undertaken and was being performed for the carrier's benefit by McRoberts.

b. McRoberts is not barred from obtaining the benefit of the limitation because it was not a party to the bill of lading.

Permeating plaintiffs' brief (pp. 2, 5, 9) is the argument that McRoberts was not a party to the bill of lading, and, therefore, has no standing to enforce the limitation provisions agreed to by plaintiffs. For example, plaintiffs' brief (p. 9) avers that "only the parties to a contract may enforce contract provisions." Plaintiffs' position is baseless. Their argument is opposed to basic legal tenets. It is refuted by firmly-embedded authorities, including recent and unequivocal decisions of this Court.

Plaintiffs (brief, pp. 11-12) refer to the reasoning of the High Court of Australia in *Wilson* v. *Darling Island*

Stevedoring & Lighterage Co., 1 Lloyd's List L.R. 246 (1956) which was quoted by the Supreme Court in the *Herd* case, *supra*, 359 U.S. 297, 308, 79 S. Ct. 766, 3 L. Ed.2d 820:

> "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law—deducible from the *Elder Dempster Case* or from any other case—which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore negligently soaks cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort."

Ignored by plaintiffs is the immediate following and concluding paragraph of the Supreme Court in *Herd* to the effect that it is completely permissible for the parties, via the bill of lading, to extend the limitation:

> "Under the common law as declared by this Court, petitioner was liable for all damages caused by its negligence unless exonerated therefrom, in whole or in part, by a constitutional rule of law. No statute has limited its liability, *and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract.* It follows that petitioner's common-law liability for damages

caused by its negligence was in no way limited, and the judgment below so holding was correct and must be" (359 U.S. at 308) (emphasis added).

Innumerable decisions have granted to a party the benefits of the limitation even though it was not a party to the bill of lading (*Bernard Screen Printing Corp.* v. *Meyer Line, supra,* 464 F.2d 934 (2d Cir. 1972), cert. denied 410 U.S. 910, 93 S. Ct. 966, 35 L.Ed.2d 272 (1973); *Carle & Montanari* v. *American Export Isbrandtsen Lines, Inc., supra,* 275 F. Supp. 76 (S.D.N.Y. 1967), affd. on Judge Bonsal's opinion 386 F.2d 839 (1967), cert. denied 390 U.S. 1013, 88 S. Ct. 1263, 20 L.Ed.2d 162, *supra,* (1968); *Secrest Machine Corp.* v. *S.S. Tiber, supra,* 450 F. 2d 285 (5th Cir. 1971); *Tessler Brothers (B.C.) Ltd.* v. *Italpacific Line, supra,* 494 F.2d 438 (9th Cir. 1974)).

In *Herd,* the party attempting to invoke the limitation was not a beneficiary of the contract and the Supreme Court held that statute *ex proprio vigore* did not extend the limitation. However, as expressly held by this and other courts, *Herd,* itself, constitutes incontrovertible authority for the proposition that the parties may extend the limitations to a person not a party to the bill of lading (*Bernard Screen Printing Corp.* v. *Meyer Line, supra,* 464 F.2d 934, 936-37 (2d Cir. 1972), cert. denied 410 U.S. 910, 93 S. Ct. 966, 35 L.Ed.2d 272 (1973); *Carle & Montanari* v. *American Export Isbrandtsen Lines, Inc., supra,* 275 F.Supp. 76, 78 (S.D.N.Y. 1967), affd. on Judge Bonsal's opinion 386 F.2d 839 (1967), cert. denied 390 U.S. 1013, 88 S. Ct. 1263, 20 L.Ed.2d 162 (1968); *Secrest Machine Corp.* v. *S.S. Tiber, supra,* 450 F.2d 285, 286-87 (5th Cir. 1971)).

Focusing solely upon principles of contract law, plaintiffs' claim that a person not a party to a contract may not enforce it is totally untenable (*Lawrence* v. *Fox,* 20 N.Y. 268; *Seaver* v. *Ransom,* 224 N.Y. 233).

Plaintiffs raise the point (brief, p. 8) that the contract between the stevedore and McRoberts does not purport to extend the limitation to McRoberts. Plaintiffs' argument is irrelevant because it is McRoberts' contention that it is entitled to receive the benefit of the limitation directly from the bill of lading.

c. The bill of lading in its extension of the limitation to "independent contractors" fully met the test of "clarity." There was no necessity that a "protective agency" be specifically mentioned.

Nor can McRoberts be denied the benefit of the limitation because although the bill of lading extended to "independent contractors," the bill of lading did not specifically enumerate a protective agency as a beneficiary. In *Bernard Screen Printing Corp.* v. *Meyer Line, supra,* 464 F.2d 934 (1972), cert. denied 410 U.S. 910, 93 S. Ct. 966, 35 L.Ed.2d 272 (1973), this Court held that the stevedore was a beneficiary even though it was not specifically mentioned, the bill of lading listing "person, firm or corporation, or other legal entity whatsoever (including the master, officer and crew of the vessel and all agents and independent contractors)."

Neither was the stevedore specifically mentioned in *Secrest Machine Corp.* v. *S.S. Tiber, supra,* 450 F.2d 285 (5th Cir. 1971). There, the bill of lading's language was: "the Carrier's agents, servants and employees and of any independent contractor." The limitation was held to be within the orbit of the bill of lading.

Likewise, in *Tessler Brothers (B.C.) Ltd.* v. *Italpacific Line, supra,* 494 F.2d 438 (9th Cir. 1974), there was no specific reference to the stevedore. The bill of lading spoke of "servant or agent of the Carrier (including every independent contractor from time employed by the Car-

rier)." In granting the benefit of the limitation to the stevedore, the court reasoned:

> "Whether a bill of lading extends limitations of liability to stevedores depends on whether 'the clarity of the language used expresses such to be the understanding of the contracting parties.' *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. at 305, 79 S.Ct. at 771. Two circuits have recently held that a bill of lading mentioning independent contractors clearly includes stevedores. *Bernard Screen Printing Corp.* v. *Meyer Line*, 464 F.2d 934, 936 n.1 (2d Cir. 1972), cert. denied, 410 U.S. 910, 93 S.Ct. 966, 35 L.Ed.2d 272 (1973); *Secrest Machine Co.* v. *S.S. Tiber*, 450 F.2d 285, 287 (5th Cir. 1971). The language of the district court in *Bernard Screen* is instructive:
>
> > 'To exclude "stevedores," who are independent contractors, from the scope of the more inclusive term would, in effect, be holding that parties by using the more inclusive term had accomplished the opposite result.'
>
> "328 F.Supp. at 290. We agree, and hold that the bill of lading at issue extended a limitation of liability to Matson, a stevedore" (494 F.2d at 446-47).

The standard laid down by the Supreme Court in *Herd* was the test of clarity. Clarity is not specificity. In his decision in District Court in *Bernard Screen*, 328 F. Supp. 288 (S.D.N.Y. 1971), which was affirmed by this Court, Judge Newman, sitting by designation, stated:

> "The requirement of 'clarity of language' serves a salutary purpose so that limitations of liability may not rest upon vague and ambiguous terms. But this does not mean that language, which is unequivocal, should be ignored merely because it fails

> to catalog the various particulars which form a definite, expressed entity. Language in a contract should be construed in its context and with an eye to the function to be accomplished.
>
> "Clarity is not synonymous with specificity. In *Carle & Montanari,* the bill of lading referred to 'all agents and all stevedores.' The substitution of the words 'independent contractors' for 'stevedores' in a contract drawn by persons engaged in the shipping industry was intended to have some significance. To exclude 'stevedores', who are independent contractors, from the scope of the more inclusive term would, in effect, be holding that parties by using the more inclusive term had accomplished the opposite result" (328 F.Supp. at 290).

Plaintiffs here agreed to the limitation. They had the right, which they refused to avail themselves of, to declare the true value and avoid the limitation. Not having done so, they may not now disavow the limitation in the bill of lading.

Judge Bonsal in *Carle & Montanari* v. *American Export Isbrandtsen Lines, Inc., supra,* 275 F. Supp. 76, 79 (S.D. N.Y. 1967), affd. on Judge Bonsal's opinion 386 F.2d 839 (1967), cert. denied 390 U.S. 1013, 88 S. Ct. 1263, 20 L.Ed. 2d 162 (1968) held:

> "Plaintiff also relies upon cases dealing with contractual provisions purporting to exonerate a party from liability for negligence, and argues that the stevedore is not entitled to limit its liability because the bill of lading, which must be strictly construed against the stevedore, does not specifically mention negligence. However, a contract which fixes the value of goods accepted for shipment and thereby limits liability for damage to the goods, is

not a contract exonerating a negligent party from liability. See, e.g., *Ansaldo San Giorgio I* v. *Rheinstrom Brothers Co.*, 294 U.S. 494, 55 S. Ct. 483, 79 L.Ed. 1016 (1935); *Kansas City Southern Railway Co.* v. *Carl*, 227 U.S. 639, 33 S. Ct. 391, 57 L.Ed. 683 (1913). *If plaintiff wanted to avoid the $500 per package limitation of liability in the bill of lading, it would have declared a higher value and paid extra freight*" (emphasis added).

See also *Tessler Brothers (B.C.) Ltd.* v. *Italpacific Line*, *supra*, 494 F.2d 438, 445 (9th Cir. 1974):

> "Even viewed in this light, we cannot agree that Tessler gave no 'understanding consent' to the bill of lading. Tessler does not contend that it was unaware of the provisions in question; nor did it present evidence to the district court adequately explaining its failure to declare a higher value, as the bill of lading provided that it could, and thereby increase the liability of the carrier and the carrier's agents, or to insure itself against the loss that occurred. In the absence of such evidence, we are reluctant to remedy what might be nothing more than lack of foresight."*

---

* There is no claim by plaintiffs in the instant case that they did not have an opportunity to declare the higher value. Such burden of proof is on plaintiffs (*Tessler Brothers (B.C.) Ltd.* v. *Italpacific*, *supra*, 494 F.2d 438, 443 (9th Cir. 1974)).

CONCLUSION

The judgment appealed from should be affirmed.

Dated: January 15, 1975

Respectfully submitted,

J. Robert Morris,
Attorney for Third-Party Defendant-Appellee McRoberts Protective Agency, Inc.,
111 Fulton Street,
New York, N. Y. 10038
766-2528

Joseph D. Ahearn,
Of counsel.

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Joseph D. Ahearn Esq. being duly sworn,

deposes and says that he is over the age of 21 years and resides at

Levittown, New York
That on the 15th. day of January , 1975

he served the annexed Brief of Third Party Defendant-Appellee upon

1. Vincent, Berg & Russo Esqs.
Attorneys for Plaintiff-Appellant
127 John Street
New York, New York

2. Hill, Rivkins, Carey, Loesberg & O'Brien Esqs.
Attorneys for Plaintiffs-Appellants
120 Broadway
New York, New York

3. Kirlin Campbell & Keating Esqs.
120 Broadway
New York, New York

4. Hill Betts & Nash Esq.
One Worlsd Trade Center
New York, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 15th.
day of January, 19 75

Raymond J. Braddick

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975

United States Court of Appeals
for the Second Circuit

375—Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Toyomenkam Inc.,
Plaintiff-Appellant
-against-
S.S. Toshaharu Maru" her engines, boilers etc.
and against
Yamashita-Shinnihon Steamship Co. Ltd.
d/b/a Y.S. Line
Defendant and Third Party
Plaintiff Cross-Appellant
-against-
International Terminal Operating Co. Inc., and
McRoberts Protective Agency Inc.,
Third Party Defendant and
Cross-Appellant

AFFIDAVIT OF SERVICE